STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 24, 2011
v	No. 297024 Allegan Circuit Court
DANIEL JOEL FOSTER II, Defendant-Appellant.	LC No. 09-016356-FC

Before: HOEKSTRA, P.J., and MURRAY and M.J. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (sexual penetration with a person under 13), and second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (sexual contact with a person under 13). The trial court sentenced him to 25 to 50 years in prison for the CSC I conviction, and 3 years and 11 months to 15 years in prison for the CSC II conviction. We affirm.

I. BACKGROUND

This case arises out of allegations that defendant sexually abused his girlfriend's daughter over a three-year period. After the nine-year-old victim reported the abuse to Safe Harbor Children's Advocacy Center as well as to her elementary school counselor, a detective from the Allegan County Sheriff's Department contacted defendant. Defendant subsequently selected a date and time for an interview where he admitted abusing the victim and was arrested. At his ensuing trial, defendant maintained that he falsely admitted the abuse because he felt pressured by the detective who informed him that the victim would receive help if he confessed. The jury nonetheless convicted him of the aforementioned offenses, and the instant appeal followed.

II. ANALYSIS

A. CONFESSION

Defendant's first argument on appeal is that the trial court erred in denying his pretrial motion to suppress his confession because the interview during which he made the confession amounted to a custodial interrogation without *Miranda*[1] warnings. A trial court's ultimate decision on a motion to suppress evidence is reviewed de novo, but its factual findings in connection with a *Walker* hearing[2] are reviewed for clear error. *People v Nelson*, 443 Mich 626, 631 n 7; 505 NW2d 266 (1993); *People v Akins*, 259 Mich App 545, 595; 675 NW2d 863 (2003). "[W]hether a person is in custody for purposes of *Miranda* is a mixed question of law and fact that must be answered independently after review de novo of the record." *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999).

> It is well settled that *Miranda* warnings need be given only in situations involving a custodial interrogation. The term "custodial interrogation" means questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. To determine whether a defendant was in custody at the time of the interrogation, we look at the totality of the circumstances, with the key question being whether the accused reasonably could have believed that he was not free to leave. The determination of custody depends on the objective circumstances of the interrogation rather than the subjective views harbored by either the interrogating officers or the person being questioned. [*Id*. at 449 (citations and quotation marks omitted).]

In *People v Mendez*, 225 Mich App 381, 384; 571 NW2d 528 (1997), this Court reversed the trial court's order granting the defendant's motion to suppress because "[the] defendant was not 'in custody' such that *Miranda* warnings were required." As the Court explained:

> Here, the facts are undisputed that defendant picked the time of the interview in response to a police letter requesting an interview, drove himself to the police station, was left alone and unrestrained in an interview room, and, after giving written answers to some questions (which the investigators told him they did not believe), was allowed to leave. The investigators testified that they informed defendant at the outset of the interview that he was not under arrest; defendant, however, did not recall being told this. Defendant had initially refused to make a statement regarding the complainant's allegations, which indicates that he did not feel coerced. The entire interview lasted approximately 1 1/2 hours. [*Mendez*, 225 Mich App at 383.]

In this case, the trial court did not err in concluding that defendant was not in custody, so no *Miranda* warning was required. Here, as in *Mendez*, defendant drove himself to the interview, he was not restrained in the interview room, and the interviewer, Detective Chris

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[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[2] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

Koster, told defendant that defendant was not under arrest and that Koster did not have a warrant. As the trial court found, Detective Koster also told defendant that he could walk out of the interview and that defendant did not have to be at the interview. Although defendant testified on direct examination that he did not feel free to leave, "determination of custody depends on the objective circumstances of the interrogation rather than the subjective views harbored by" defendant. *Zahn*, 234 Mich App at 449. If anything, this is a clearer case than *Mendez* because of what occurred at the end of the interview. After Koster asked if defendant needed a break, defendant went outside, unrestrained and unaccompanied, and smoked a cigarette. Although defendant testified that Koster had specifically asked defendant to wait for him and that he did not believe he had permission to leave because Koster wanted to continue their conversation, he also acknowledged that he could have left had he chosen to do so.

Additionally, we reject defendant's argument that application of the factors set forth in *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988), "weighs against the introduction of [his] statement." Although *Cipriano* addressed the voluntariness of a statement made *after arrest* but before arraignment, *id*. at 319,[3] our Supreme Court has applied the *Cipriano* test to an interrogation during which the defendant was told that he was not under arrest and could leave at any time. *People v Sexton*, 461 Mich 746, 752-753; 609 NW2d 822 (2000), adopting the opinion in relevant part of JUDGE MURPHY, in *People v Sexton*, 236 Mich App 525, 543; 601 NW2d 399 (1999) (MURPHY, J., dissenting). The *Cipriano* factors for determining whether a statement is voluntary are as follows:

> [T]he age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse.
>
> The absence or presence of any one of these factors is not necessarily conclusive on the issue of voluntariness. The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made. [*Cipriano*, 431 Mich at 334 (citations omitted).]

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[3] See also *People v Manning*, 243 Mich App 615, 632; 624 NW2d 746 (2000) (describing *Cipriano* as "establish[ing] a test to determine whether a confession made during a delay between arrest and arraignment must be suppressed.")

In this case, defendant had a twelfth-grade education and no prior experience with police. On the other hand, he drove himself to the interview and was not restrained in the interview room. Indeed, because defendant appeared at the interview voluntarily, it is clear he was not detained for any length of time before the interview. Nor was there any indication that anything comparable to a detention occurred (for example, there was no evidence that defendant was kept waiting in the interview room for an extended period before the interview), and the interview lasted at most two hours. That defendant was not advised of his constitutional rights is also of no moment as Koster informed defendant that he was not under arrest.

Admittedly, defendant claimed he had only slept two hours during the 24 hours prior to the interview, which may suggest a compromised state; however, this fact is not dispositive as even "[i]ntoxication from drugs or alcohol . . . is not dispositive of the issue of voluntariness." *Akins*, 259 Mich App at 566 n 18. Even more importantly, that defendant arrived at the interview in a sleep-deprived state was of his own doing. In other words, defendant was not deprived of sleep by his interrogator as a tactic for extracting a confession. Thus, despite defendant's lack of sleep and lack of prior experience with police interrogation, we agree with the trial court's conclusion that the totality of the surrounding circumstances indicates that defendant made the statements voluntarily. The court did not err in declining to suppress defendant's confession.

B. EXPERT WITNESS TESTIMONY

Defendant next argues that the trial court abused its discretion in permitting prosecution expert, Thomas Cottrell, to testify about common behaviors of child victims of sexual abuse. A trial court's decision to admit or exclude evidence and its decision on an expert's qualifications are reviewed for an abuse of discretion. *People v Steele*, 283 Mich App 472, 480; 769 NW2d 256 (2009).

In *People v Peterson*, 450 Mich 349, 373; 537 NW2d 857 (1995), amended 450 Mich 1112 (1995), the Supreme Court held that "the prosecution may present evidence, if relevant and helpful, to generally explain the common postincident behavior of children who are victims of sexual abuse," and "may, in commenting on the evidence adduced at trial, argue the reasonable inferences drawn from the expert's testimony and compare the expert testimony to the facts of the case." Regarding the threshold of admissibility of this type of evidence, the Court explained:

> This expert testimony, however, may be introduced only if the facts as they develop would raise a question in the minds of the jury regarding the specific behavior. The behavior must be of such a nature that it may potentially be perceived as that which would be inconsistent with a victim of child sexual abuse, i.e., delay in reporting, recantation, accommodating the abuser or secrecy. The court must determine whether the particular characteristic is one that in fact calls for an expert explanation. MRE 702. The expert is then only allowed to testify regarding the behavior at issue and may not testify regarding [child sexual abuse accommodation syndrome] characteristics that are not at issue. [*Id*. at 374 n 12.]

In this case, the trial court permitted Cottrell to testify as an expert in the "dynamics of sexual abuse." Cottrell, who did not have specific knowledge of this case, testified that it is

"relatively common" for child victims of sexual abuse to recant their allegations of abuse. Specifically, children often disclose abuse "with the intention of relieving their own stress," and "having the abuse stop," but often recant when negative consequences (such as placement into foster care, rejection by siblings, being labeled at school, and financial stress on the family) ensue. The prosecutor referred to Cottrell's explanation of the possible reasons for recanting allegations of sexual abuse during closing argument and rebuttal argument. The prosecution's use of expert testimony was consistent with the limited use of such testimony allowed by *Peterson*.[4] Indeed, the development of the facts may have raised a question for the jury concerning the victim's recantation of the allegations of sexual abuse. Furthermore, the prosecution introduced Cottrell's expert testimony after the victim testified both (1) that defendant had touched her "butt," "boobs," and vagina more than one time, and "put his finger in [her] butt," and (2) that she had denied the abuse during interviews with Koster in January 2009 and pediatrician Dr. Sarah Brown in April 2009. The trial court did not abuse its discretion.

C. MISSING WITNESS INSTRUCTION

We also find unpersuasive defendant's claim that the circuit court erred in denying his request for CJI2d 5.12, the missing-witness instruction. "Questions of law, including questions of the applicability of jury instructions, are reviewed de novo." *People v Perez*, 469 Mich 415, 418; 670 NW2d 655 (2003). Whether a jury instruction applies to the facts of the case, however, is reviewed for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). "A trial court abuses its discretion when it selects an outcome that does not fall within the range of reasonable and principled outcomes." *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007). "[I]f an applicable instruction was not given, the defendant bears the burden of establishing that the trial court's failure to give the requested instruction resulted in a miscarriage of justice." *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002). "Reversal for failure to provide a jury instruction is unwarranted unless it appears that it is more probable than not that the error was outcome determinative." *People v McKinney*, 258 Mich App 157, 163; 670 NW2d 254 (2003).

A missing witness instruction may be appropriate if the prosecution fails to call a listed witness. *People v Cook (On Remand)*, 266 Mich App 290, 292-293, 293 n 4; 702 NW2d 613 (2005). Specifically, the missing witness instruction, CJI2d 5.12, permits a jury to infer that a missing witness's testimony would have been unfavorable to the prosecution. *Id*. at 293 n 3. "[I]n every instance, the propriety of reading CJI2d 5.12 will depend on the specific facts of that case." *Perez*, 469 Mich at 420-421.

Here, defendant requested the missing-witness instruction concerning Laura Mikrit, a Department of Human Services caseworker who was involved in CPS or foster care treatment of

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[4] Defendant's argument that the expert's testimony regarding recantation and disclosure should have been excluded because it is not a recognized discipline is not supported by the amended MRE 702 and the more permissive holding of *People v Ackerman*, 257 Mich App 434, 444; 669 NW2d 818 (2003).

the victim and her siblings when they were removed from the care of the victim's mother. The prosecution initially intended to call Mikrit to testify about "some of the pressures that were exerted upon the child," but decided not to call her given some delays at trial and because it believed her testimony would be cumulative.

At the outset, it is clear the prosecution failed to comply with MCL 767.40a(4), which permits the prosecution's deletion from its witness list "upon leave of the court and for good cause shown or by stipulation of the parties." *Id*. at 420-421. However, we find this error insufficient to trigger the missing witness instruction. Indeed, when it became clear at the close of the prosecution's case that the prosecution was not going to call Mikrit, defense counsel failed to raise any issue with respect to Mikrit, let alone seek leave to call her as a witness or request a continuance. See *People v Suchy*, 143 Mich App 136, 141; 371 NW2d 502 (1985) (a defendant's right to a fair trial is vital to a court's determination of whether to permit the late endorsement of a witness). Moreover, the prosecution indicated that Mikrit was actually present in the courthouse for two days of the trial and was available by cell phone had defendant wanted to call her as a witness. Under these circumstances, the decision not to give the missing witness instruction did not fall outside the range of reasonable and principled outcomes. But even if there were error, defendant has failed to establish a resulting miscarriage of justice where, if anything, Mikrit's testimony would have benefited the prosecution rather than the defense. Reversal is not warranted.

D. VICTIM'S COUNSELING RECORDS

This brings us to defendant's final argument – that the trial court abused its discretion in refusing defendant access to the records of the victim's sessions with Safe Harbor counselor Sandy Horwath. A trial court's ruling on whether records are discoverable or protected by a privilege is reviewed for an abuse of discretion. See *People v Stanaway*, 446 Mich 643, 680; 521 NW2d 557 (1994).

Confidential communications between a sexual assault counselor and a victim are privileged and therefore are generally not "admissible as evidence in any civil or criminal proceeding without the prior written consent of the victim." MCL 600.2157a(2); *Stanaway*, 446 Mich at 655-656, 662. But "[t]he state's interest in preserving the confidentiality of the . . . records must yield to a criminal defendant's due process right to a fair trial when the defendant can show that those records are likely to contain information necessary to his defense." *Id*. at 679-680. This showing requires "a good-faith belief, grounded in articulable fact, that there is a reasonable probability that records protected by privilege are likely to contain material information necessary to the defense" before the trial court conducts an in camera inspection of the records. MCR 6.201(C)(2); see also *Stanaway*, 446 Mich at 649-650. "Where the defendant has made the required showing, in camera inspection of privileged documents by the judge strikes the delicate balance between the defendant's federal and state constitutional rights to discover exculpatory evidence shielded by privilege, and the Legislature's interest in protecting the confidentiality of the therapeutic setting." *Stanaway*, 446 Mich at 678-679.

In *Stanaway*, our Supreme Court held that the trial court did not abuse its discretion in refusing to order an in camera inspection of counseling records where the defendant made only "a generalized assertion that the counseling records may contain evidence useful for

impeachment on cross-examination," and failed to "state[] any specific articulable fact that would indicate that the requested confidential communications were necessary to a preparation of his defense." *Id*. at 681-682. In the absence of anything beyond a general allegation that the records may contain prior inconsistent statements, the Court concluded that "[the] defendant [wa]s fishing." *Id*. at 681.

Here, as in *Stanaway*, the trial court did not abuse its discretion in declining to review the records in camera because defendant failed to demonstrate a reasonable possibility that the records contained material information necessary to the defense. Indeed, while the records would reveal that the victim had recanted her allegations of abuse, this fact was already well-established by the trial testimony. And, the possible explanations for the victim's subsequent denials contained in the records would have buttressed the prosecution's case rather than aided defendant's. On appeal, defendant explains that he "was looking for further corroboration as to why the victim was telling different versions of her story," and indicates that the records may have revealed motivations to falsely accuse defendant. Although this is more than mere speculation that information may have been in the records, under *Stanaway*, 446 Mich at 681-682, and MCR 6.201(C)(2), we conclude that the trial court's decision fell within the range of reasonable and principled outcomes.

In any event, even if the trial court did abuse its discretion, we hold that any error was harmless. After examining the record, both in relation to defendant's guilt as well as the evidence already existing and presented at trial regarding the victim's recantation, we conclude that any error was not outcome determinative. *People v Whittaker*, 465 Mich 422, 426-427; 635 NW2d 687 (2001). Not having additional information regarding the victim's recantation did not undermine the reliability of the verdict because the recantation issue was presented to the jury.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Christopher M. Murray
/s/ Michael J. Kelly